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No. 83-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

vs.

THOMAS O. ROBINSON, JR.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MEMORANDUM FOR THOMAS O. ROBINSON, JR. IN OPPOSITION

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United States of America, Petitioner, contends that certiorari should be granted because of the failure of respondent to object to the prosecutor's reference in closing argument to his failure to testify.

1. The Court of Appeals reversed Mr. Robinson's conviction on the basis of the prosecutor's references during rebuttal argument to his failure to testify. The objectionable closing argument was as follows:

> He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

2. The United States of America argues that the comments of the United States Attorney were invited by the following statements by defense counsel during closing argument:

> Before I forget, my theme in arguing his case to you, I believe, is going to be that the Government has a duty to be fair. They have a duty to prove their case. And they have a duty to prove it, if they are going to prove it, fairly and squarely. And in this case, they haven't played straight with you members of the jury.
>
> . . . .
>
> By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sort of things, about mail fraud?
>
> Did they ever give this man an opportunity in their many, many statements they took at the time to say, "Well, I had two bedroom sets."
>
> . . . .
>
> . . . .when he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson.
>
> . . . .
>
> . . . .They never gave him a chance to explain.
>
> . . . .
>
> Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community rather than before the agents?
>
> Now, here is what the Government, to be fair with the jury, should have done. They should have taken those

> items in the Kentucky inventory and just proved them. Why let the defendant disprove them, giving him an opportunity to explain?
>
> . . . .
>
> The Government has not brought you all the proof that they should to show you guilty and innocence.
>
> They brought you the type of proof that they carefully filtered, to try to infer (sic) circumstantially the guilt of Mr. Robinson. Shouldn't they have gone through and brought you evidence of more situations where there have been false claims rather than one or two for Kentucky?

3. The Court of Appeals found this to be error and rejected the Government's argument that it was harmless error under *Chapman v. California,* 386 U.S. 18 (1967).

Now, before this Honorable Court in its Petition for Certiorari, the Government for the first time argues that counsel failed to object to the argument and therefore it is precluded by waiver. Nowhere in the thirty-seven page brief submitted in the Court of Appeals, nor in the Opinion of that Court (appendix 1A through 13A) is the question of waiver at all addressed. Even if it had been addressed below, the District Judge recognized that counsel opposed the introduction of such argument when after a bench conference Judge Wiseman made this comment to both the Government attorney and the defense attorney:

> We might get reversed on it. Mr. Durham opened the door not less than four times in his argument on that question. I will let you comment on it in response.

It is true that there is no formal objection in the record, but any fair reading of the record would show that it was understood that the evidence was being admitted without the consent of the defendant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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February, 1984